***CHALLENGES TO THE PROSECUTION OF ANTICOMPETITIVE BHEAVIOR BY BRAZIL’S REGULATOR OF ENERGY MARKETS***

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**Overview**

 Brazil’s National Agency of Electric Energy (ANEEL) has published in the beginning of 2024 a technical document manifesting its concerns with the increase of complaints involving anticompetitive behavior in two specific activities within the Brazilian electricity markets (ANEEL, 2024). One of these activities is the transition of consumers from the so called “regulated market” (ACR), to the so called “free market” (ACL). The other one concerns consumer’s requests to connect distributed generation projects to the distribution network.

 According to this technical document, ANEEL’s Director-President has issued a memorandum (ANEEL, 2023) requesting the creation of a new division within the Superintendence of Economic, Financial and Market Surveillance (SFN) with the sole purpose of developing the means and procedures to be observed by ANEEL in the administrative prosecution of anticompetitive behavior. This new division would also be responsible for coordinating cooperation institutional relations with other authorities, within the Brazilian Federal Government, with jurisdiction and expertise to tackle anticompetitive behavior in other markets.

 This paper focuses on assessing the main institutional challenges of legal and economic nature that ANEEL might encounter, while developing its institution means and processes to engage in tackling anticompetitive behavior complaints filed by different types of economic agents.

**Methods**

Given the incipience of the initiative within ANEEL, the analysis carried out in this paper is prominently based on the laws and regulations in force, on the public documents produced by ANEEL within the context of the creation of this new division, and on the cases involving distributed generation that were judged by the Brazilian Administrative Council for Economic Defense (CADE), which is the main Brazilian competition authority within the Federal Government.

There are different means that could be used to assess the existence of anticompetitive behavior (CADE, 2016 and 2021). Although ANEEL has a certain level of discretion to develop and adopt the methods its team may deem more appropriate, this paper starts from assessing if there are institutional interpretations of the market structures of the distributed generation by CADE. This analysis is made possible through empiric research on CADE’s case law, comprehending administrative proceedings regarding merger control and pertinent publicly available proceedings regarding anticompetitive behavior in this market.

Based on the results of the empiric assessment of CADE’s case law on the merits of anticompetitive behavior concerning distributed generation in Brazil, and on ANEEL’s publicly manifested intentions on how to tackle these cases while exercising its jurisdiction, this paper highlights some of ANEEL’s possible challenges to implement this new institutional role in the near future.

**Results**

Legally, both CADE and ANEEL have jurisdiction to tackle competitive issues in Brazil’s broader energy markets, including but not limited to anticompetitive behavior (BRASIL, 1996 and 2011). Merger clearance proceedings involving energy markets are subject to double and simultaneous filings, whenever the intended transaction affect the criteria subject to ANEEL’s surveillance. Historically, ANEEL did not get involved in CADE’s cases regarding the administrative prosecution of anticompetitive behavior, unless formally inquired by CADE to contribute. ANEEL does assess merger clearance cases, though, and it tends to follow CADE’s competitive assessment, except on the rare occasions in which the resulting concentration may lead to concerns on the proposed market structures, as defined by law and/or pertinent regulation.

The empiric research on CADE’s case law, specifically focused on the distributed generation markets, have resulted in 63 (sixty-three) cases: one single case regarding anticompetitive behavior, and 62 (sixty-two) merger clearance cases. Only one of the merger clearance cases was assessed under the ordinary merger clearance proceeding, in which a competitive assessment is conducted, however the market involved in the intended transaction was defined as the services of energy efficiency market, which entailed distributed generation projects, not exclusively, but when combined with other broader energy efficiency solutions. Thus, the market structure assessment would not suit the purpose of assessing the competitive dynamics specifically in the distributed generation market. All other 61 merger clearance cases were assessed by CADE under the fast-track proceeding, in which no in-depth market assessments are conducted, because the intended transactions did not lead to any competitive concerns. All merger clearance cases were cleared, with no restrictions imposed.

The one case regarding an anticompetitive behavior investigation was initiated by CADE *ex-officio*, based on 26 complaints received against two companies: one that was granted the concession for exploring energy distribution activities in the State of Minas Gerais, and one company that acts as an integrator for distributed generation projects, both belonging the same economic group. On a product/service perspective, no market definition was adopted to assess competitive dynamics, and on a geographic perspective, the market was defined as national. The case was filed due to the lack of evidence of anticompetitive behavior by either company.

**Conclusions**

In order to start conducting investigations of anticompetitive behavior in the distributed generation markets, ANEEL is likely to face institutional challenges of two sorts: one of them being the methods it will choose to adopt to interpret the market structures, since CADE has not yet faced a case that has required them to conduct a proper assessment of structure of offer and demand of these markets, and the other being how effective such methods will be in providing a just application of the wide variety of penalties provided by law, in case anticompetitive behavior is verified.

Depending on how effective and on how strict or how lenient ANEEL choses, the shared jurisdiction might lead to an institutional duality that would, in theory, allow investigated companies to “shop” for the most lenient authority to be judged by. On another hand there could be an increased judicialization of decisions in case CADE and ANEEL adopt double standards to assess the same type of conducts.

Many of the institutional design aspects of this incipient ANEEL policy are yet uncertain, but there are multiple challenges and some of them could shape how companies assess whether anticompetitive behavior are worth the risk and, if so, by which authority would they like to persecuted.

**References**

ABSOLAR. Infográfico – Panorama da Fonte Solar Fotovoltaica no Brasil e no Mundo. Available at: <https://www.absolar.org.br/mercado/infografico/>. Accessed in: March 4, 2024.

ANEEL, 2024. NOTA TÉCNICA No 17/2024 - SFF/ANEEL, dated February 8, 2024, issued within Process N. 48500.000492/2024-12.

ANEEL, 2023. Memorando N. 30/2023-DR/ANEEL, dated May 12, 2023, which created Administrative Proceeding N. 48500.000492/2024-12.

ANEEL, 2021. Normative Resolution N. 1.000, dated December 7, 2021.

BRASIL, 2022. Law N.14.300, dated January 6, 2022.

BRASIL, 2011. Law N. 12.529 dated November 30, 2011.

BRASIL, 1996. Law N. 9.427, dated December 26, 1996.

BRASIL, 1988. Federal Constitution.

CADE, 2021. Documento de Trabalho Nº 006/2021, Atualização do Debate Sobre a Definição de Mercado Relevante. Departamento de Estudos Econômicos – DEE. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2021/Documento-de-Trabalho_Atualizacao-do-debate-sobre-a-definicao-de-mercado-relevante.pdf>. Accessed in: March 1, 2024.

CADE, 2016. Guia para Análise de Atos de Concentração Horizontal. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf>. Accessed in: March 1, 2024.